SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 724

TROY-PARISIAN, INC.,

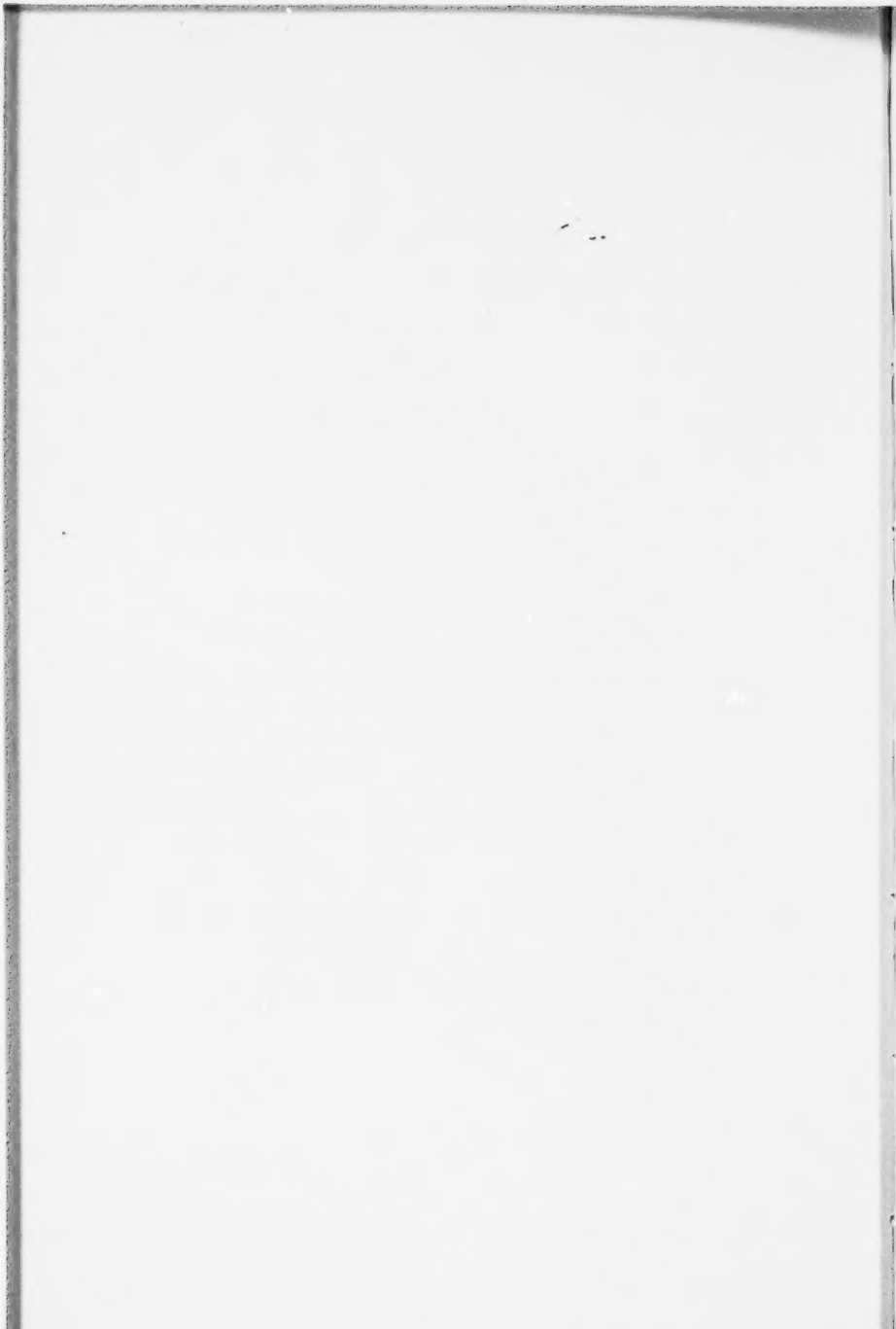
Petitioner,

vs.

THE UNITED STATES OF AMERICA, ON RELATION AND FOR THE BENEFIT OF THE ADMINISTRATOR OF THE FEDERAL HOUSING ADMINISTRATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

O. A. JOHANNESEN,
RALPH L. ALBAUGH,
MARSHALL CHAPMAN,
JAMES T. MURPHY,
Counsel for Petitioner.



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THE UNITED STATES OF AMERICA, ON RELATION AND FOR THE BENEFIT OF THE ADMINISTRATOR OF THE FEDERAL HOUSING ADMINISTRATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, and the Associate Justices:

Your petitioner respectfully shows:

I.

Summary Statement of Matter Involved.

This is an action wherein the United States of America on relation and for the benefit of the Administrator of the

Federal Housing Administration is seeking to recover a money judgment by reason of a certain conditional sales contract and installment note, the installment note and conditional sales contract being one instrument, covering the purchase, sale, and installation of an automatic stoker, a water cooler, a forced air evaporator, and a refrigerating compressor. The conditional sales contract and note was for value on the 11th day of May, 1936, endorsed to the Twin Falls Bank and Trust Company, of Twin Falls, Idaho, which was an insured institution pursuant to Title I, Section 2 of the National Housing Act, 48 Stat. 1246, 12 U. S. C., Section 1703, and upon which assignment the note and contract became insured against loss by reason of non-payment. The petitioner, Troy-Parisian, Inc., after paying the purchase price of the water cooler, forced air evaporator, and refrigerating compressor, refused to make further payments insofar as the purchase price of the automatic stoker was concerned, by reason of a total failure of consideration and a breach of implied warranty of fitness as to the stoker. No payments were made after February 12, 1937, and thereafter the Bank declared the entire sum due according to the terms and conditions of the note and contract, and demanded payment from the Federal Housing Administration. The Federal Housing Administration paid the Bank the amount then owing, the note and contract were endorsed and transferred to the Administration, and suit was commenced in the District Court of the United States for the District of Idaho by the United States to recover from the petitioner, Troy-Parisian, Inc., the amount due on the note and contract.

The District Court of the United States for the District of Idaho entered judgment on the 28th day of September, 1939, in favor of the petitioner and against the United States of America on relation and for the benefit of the Adminis-

trator of the Federal Housing Administration. An appeal from such judgment was taken by the United States, to the United States Circuit Court of Appeals for the Ninth Circuit, and on the 30th day of October, 1940, a decision was rendered by such court reversing the decree of the trial court. A petition for rehearing was duly filed by this petitioner, Troy-Parisian, Inc., which petition for rehearing was denied by said Circuit Court of Appeals for the Ninth Circuit on the 29th day of November, 1940.

II.

Principal Questions Involved.

(1) A non-negotiable sales contract including therein a negotiable promissory note as a part thereof will be construed together as one agreement, and as such is a non-negotiable instrument.

(2) In case of an assignment of a non-negotiable instrument, the action by the assignee is without prejudice to any setoff or other defense existing at the time of or before notice of the assignment.

(3) A provision in a non-negotiable instrument expressly providing that seller may assign the contract without notice to purchaser, and when assigned shall be free from any defense, counterclaim, or cross-complaint by purchaser, is void and against public policy, in that it bars the defense of failure of consideration and breach of implied warranty of fitness, and deprives one from enforcing his rights by the usual proceedings in the ordinary tribunals, and is designed to settle in advance the substantive rights of parties under the contract and oust the courts of their jurisdiction to determine such rights.

(4) The United States, as assignee of a non-negotiable instrument, is subject to the same rules of law as apply to individuals and private corporations.

(5) Where a piece of equipment is worthless for the purpose for which it is purchased there is a failure of consideration constituting a defense to an action on a conditional sales contract and promissory note given for the purchase price prosecuted by an assignee.

(6) Where a piece of machinery is purchased for a particular purpose, and the buyer relies on the seller's skill or judgment, there is an implied warranty that such machinery shall be reasonably fit for the purpose for which it is purchased.

III.

Reasons Relied On for the Allowance of the Writ.

(1) The decision of the Circuit Court of Appeals for the Ninth Circuit, to the effect that Article 5 of the contract involved herein, to-wit:

> "Seller may assign the contract to Twin Falls Bank & Trust Company without notice to purchaser, and when assigned shall be free from any defenses, counterclaims or cross-complaints by purchaser",

is a bar to the defenses interposed by appellee of failure of consideration and breach of implied warranty as to fitness of the stoker in question, is a decision of an important question of local law in a way probably untenable, or in conflict with applicable local statutes and decisions, in that said decision of the Circuit Court of Appeals for the Ninth Circuit in this connection failed to construe Section 5-302 Idaho Code Annotated, 1932, which provides as follows:

> "In case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable instrument, transferred in good faith and upon good consideration, before maturity",

in conjunction with the provisions of Section 28-110, Idaho Code Annotated, 1932, which provides as follows:

> "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void",

and is in conflict with the decisions of the Idaho Supreme Court in the cases:

General Motors Acceptance Corporation v. *Talbott*, 38 Idaho 13, 219 P. 1058;

Douville v. *Pacific Coast Casualty Co.*, 25 Idaho 396, 138 P. 506;

Gaffney v. *Royal Neighbors of America*, 31 Idaho 549, 174 P. 1014;

Harding v. *Mutual Benefit Health & Accident Ass'n*, 155 Idaho 131, 39 P. (2d) 306.

(2) The decision of the Circuit Court of Appeals for the Ninth Circuit to the effect that Article 5 of the contract in question is a bar to the defenses interposed by appellee of failure of consideration and breach of implied warranty as to witness of the stoker in question, is in conflict with an important question of local law in a way probably in conflict with applicable local decisions, and untenable or in conflict with the weight of local authority, in that such a provision in a contract is void as against public policy, in that it is designed to settle in advance the substantive rights of parties under the contract, and oust the courts of their jurisdiction to determine such rights, as such rule is laid down by the following authorities, to-wit:

Progressive Finance & Realty Co., Inc. v. *Stempel*, (Mo. App.) 95 S. W. (2d) 834;

San Francisco Securities Corporation v. *Phoenix Motor Co., Inc.* (Ariz.) 220 P. 229;

Steinhardt v. *Consolidated Grocery Co.*, (Fla.) 86 So. 431;

General Motors Acceptance Corporation v. *Talborr*, 38 Idaho 13, 219 P. 1058;

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Frick-Reed Supply Corporation v. *Meers*, (Tex. C. A.) 52 S. W. (2d) 115;

Douville v. *Pacific Coast Casualty Co.*, (Idaho) 25 Idaho 396, 138 P. 506;

Gaffney v. *Royal Neighbors of America*, 31 Ida. 549, 174 P. 1014;

Harding v. *Mutual Benefit Health and Accident Ass'n*, 55 Ida. 131, 39 P. (2d) 306.

(3) The decision of said Circuit Court of Appeals for the Ninth Circuit to the effect that Article 5 of the contract in question is a bar to the defenses of total failure of consideration and breach of implied warranty as to fitness of the stoker in question is a decision of an important question of local law in a way probably in conflict with applicable local decisions, that is to say, the decision of the Idaho Supreme Court in the case of *Pacific Acceptance Corporation* v. *Whelan*, 43 Idaho 15, 248 P. 444, wherein the Idaho Supreme Court held that a similar contractual provision was invalid, and did not preclude the validity of the conditional sales agreement being attacked on the ground of total failure of consideration.

(4) The decision of said Circuit Court of Appeals for the Ninth Circuit to the effect that a non-negotiable conditional sales contract is not subject to the defenses of want of consideration and breach of implied warranty as to fit-

ness by reason of Article 5 of said contract, expressly providing that when assigned said contract shall be free from any defenses, counterclaims, or cross-complaints by purchaser, and such decision to the effect that the elements of a negotiable instrument can be imparted to such non-negotiable conditional sales contract, is a decision of an important question of local law in a way probably in conflict with applicable local decisions to an extent that it will annul and abrogate the laws of the State of Idaho and decisions of the Supreme Court of the State of Idaho holding that such a provision contained in a conditional sales contract is void, in that it deprives one from enforcing his rights by the usual proceedings in the ordinary tribunals, and is designed to settle in advance the substantive rights under the contract and oust the courts of their jurisdiction to determine such rights, and will further annul and abrogate the decisions of the Supreme Court of Idaho holding such conditional sales agreement is subject to the defenses of failure of consideration and breach of implied warranty as to fitness, and the decision will substantially affect the contract rights of all conditional sales contract makers containing similar provisions within the State of Idaho.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of the United States Supreme Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals for the Ninth Circuit had in Case No. 9432, and entitled on its docket "The United States of America, on relation and for the benefit of the Administrator of the Federal Housing Administration, Appellant, *v.* Troy-Parisian, Inc., Appellee", to the end that this case may be reviewed and determined by this Court as provided

for by the statutes of the United States, and that the judgment of the United States Circuit Court of Appeals for the Ninth Circuit be reversed by this Court, and for such other and further relief as to this Court may seem proper.

Dated this 21 day of January, A. D. 1941.

O. A. JOHANNESEN,
RALPH L. ALBAUGH,
Residing at Idaho Falls, Idaho,
MARSHALL CHAPMAN,
JAMES T. MURPHY,
Residing at Twin Falls, Idaho,
Attorneys for Petitioner.